Supreme Court, U.S.
FILED
051571 JUN 7 - 2006
OFFICE OF THE CLERK

No. 06-

IN THE

Supreme Court of the United States

MINISTRY OF FINANCE OF THE REPUBLIC OF INDONESIA,
Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

CAROLYN B. LAMM
Counsel of Record
FRANK PANOPOULOS
ERIC GRANNON
ERIKA M. SERRAN
WHITE & CASE LLP
701 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 626-3600

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether in cases where jurisdiction is predicated on the Foreign Sovereign Immunities Act of 1976 ("FSIA"), federal courts should apply federal common law choice of law rules, as held repeatedly by the Ninth Circuit, or, in contrast, the forum state's choice of law rules, as held repeatedly by the Second Circuit and in this case.

2. Whether in determining and interpreting applicable foreign law under Fed. R. Civ. P. 44.1, federal courts should conduct an independent examination of foreign law, as held by the Seventh Circuit, and not presume that foreign law is analogous to U.S. law, as the Second Circuit did in this case.

PARTIES TO THE PROCEEDING

The Ministry of Finance of the Republic of Indonesia participated as a non-party Respondent-Appellant below. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara was the Respondent-Appellant below. Karaha Bodas Company, L.L.C. was Petitioner-Appellee below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 9

I. THIS CASE SQUARELY PRESENTS AN ISSUE OVER WHICH THE COURTS OF APPEALS ARE OPENLY DIVIDED: WHETHER THE FSIA REQUIRES FEDERAL COMMON LAW OR FORUM CHOICE OF LAW RULES 9

II. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT CONCERNING JUDICIAL PRESUMPTIONS THAT FOREIGN LAW IS SIMILAR TO THE FORUM'S LAW 22

CONCLUSION 29

TABLE OF AUTHORITIES

CASES **Page(s)**

In re Aircrash Disaster Near Roselawn, Ind. on Oct. 31, 1994, 926 F. Supp. 736 (N.D. Ill. 1996) 10

Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A., 190 F.3d 16 (2d Cir. 1999) 12

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) 3

Atherton v. FDIC, 519 U.S. 213 (1997) 21

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 18, 20, 21

Banks v. Chi. Grain Trimmers Ass'n, 390 U.S. 459 (1968) 1

Barkanic v. Gen. Admin. of Civil Aviation of the P.R.C., 923 F.2d 957 (2d Cir. 1991) 10

Brink's Ltd. v. S. African Airways, 93 F.3d 1022 (2d Cir. 1996) 10

Carey v. Bahama Cruise Lines, 864 F.2d 201 (1st Cir. 1988) 22

Chuidian v. Philippine Nat'l Bank, 976 F.2d 561 (9th Cir. 1992) 10

Dammareli v. Islamic Republic of Iran, No.Civ.A. 01-2224JDB, 2005 WL 756090 (D.D.C. March 29, 2005) 10

Devlin v. Scardelletti, 536 U.S. 1 (2002) 1

Dumont v. Saskatchewan Gov't Ins. (SGI), 258 F.3d 880 (8th Cir. 2001) 10

Fid. Partners, Inc. v. First Trust Co. of N.Y., 58 F. Supp. 2d 55 (S.D.N.Y. 1999) 15, 20

First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba ("*Bancec*") 462 U.S. 611 (1983) ..... *passim*

Harris v. Polskie Linie Lotnicze, 820 F.2d 1000 (9th Cir. 1987) 13

Kaplan v. Rand, 192 F.3d 60 (2d Cir. 1999) 1

Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70 (2d Cir. 2002) ("*Pertamina I*") ..... *passim*

Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 190 F. Supp. 2d 936 (S.D. Tex. 2001) ("*In re Karaha Bodas Co.*"), *aff'd*, 364 F.3d 274 (5th Cir. 2004) 18

Liu v. Republic of China, 892 F.2d 1419 (9th Cir. 1989) 10

Morel de Letelier v. Republic of Chile, 748 F.2d 790 (2d Cir. 1984) 16

O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994) 19

Pescatore v. Pan Am. World Airways, Inc., 97 F.3d 1 (2d Cir. 1996) 10

Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468 (9th Cir. 1992) 15

Schoenberg v. Exportada de Sal, S.A. de C.V., 930 F.2d 777 (9th Cir. 1991) 10

Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001) 19

Stephens v. Nat'l Distillers & Chem. Corp., 69 F.3d 1226 (2d Cir. 1995) 16

In re Tex. E. Transmission Corp. PCB Contamination Ins. Coverage Litig., 870 F. Supp. 1293 (E.D. Pa. 1992) 10

Tex. Indus., Inc. v. Radcliff Materials, Inc.,
451 U.S. 630 (1981) 21

Twohy v. First Nat'l Bank of Chi.,
758 F.2d 1185 (7th Cir. 1985) 22

Verlinden B.V. v. Cent. Bank of Nig.,
461 U.S. 480 (1983) 3

Wallis v. Pan Am. Petroleum Corp.,
384 U.S. 63 (1966) 19

STATUTES AND RULES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1346(b)(1) 13

Foreign Sovereign Immunities Act of 1976, 28 U.S.C
§§ 1602–1611 ..... *passim*

28 U.S.C. § 2674 13

Fed. R. Civ. P. 44.1 ..... 22, 28

Fed. R. Civ. P. 69 ..... 12, 14

Fed. R. Civ. P. 69 advisory committee's
note to subdivision (a) 14

N.Y. C.P.L.R. § 5201(b) 12

N.Y. C.P.L.R. § 5222(b) 6

LEGISLATIVE HISTORY

H.R. Rep. 94-1487 (1976), *reprinted in*
1976 U.S.C.C.A.N. 6604 ..... 11, 16

SCHOLARSHIP

Andrew N. Adler, *Translating & Interpreting Foreign Statutes*, 19 Mich. J. Int'l L. 37 (1997) 23

Harold J. Berman, *Law and Revolution, II* (2003) 26

Edwin P. Carpenter, *Presumptions as to Foreign Law: How They Are Affected by Federal Rule of Civil Procedure 44.1*, 10 Washburn L.J. 296 (1971) 22

Robert Feenstra, *Dominium and ius in re aliena: The Origins of a Civil Law Distinction*, in New Perspectives in the Roman Law of Property 111 (P. Birks ed. 1989) 25, 26

Hugo Grotius, I *Jurisprudence of Holland* 235 (Robert W. Lee tr. 1977) 26

Doug M. Keller, *Interpreting Foreign Law Through An Erie Lens: A Critical Look at* United States v. McNab, 40 Tex. Int'l L. J. 157 (2004) 22

Ernst Meynial, *Notes sur la formation de la théorie du domaine divise (domaine direct et domaine utile), du XII au XIV siècle dans les romanistes*, in 2 Mélanges Fitting 413 (Meynial ed. 1908) 26

Roger J. Miner, *The Reception of Foreign Law in the U.S. Federal Courts*, 43 Am. J. Comp. L. 581 (1995) 22

John G. Sprankling & George K. Lanyi, *Pleading and Proof of Foreign Law in American Courts*, 19 Stan. J. Int'l L. 3 (1983) 22, 23

Louise E. Teitz, *From the Courthouse in Tobago to the Internet: the Increasing Need to Prove Foreign Law in US Courts*, 34 J. Mar. L. & Com. 97 (2003) 28

OTHER

14A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3662 (2d ed. 1995) 10

The Ministry of Finance for the Republic of Indonesia ("Ministry") respectfully petitions this Court for a writ of certiorari to review the judgments in this action of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The district court's April 24, 2002 Final Order is unreported (Pet. App. 1a). The Second Circuit's December 10, 2002 Opinion ("*Pertamina I*") is reported at 313 F.3d 70 (Pet. App.7a).

The district court's October 6, 2004 Opinion (Pet. App. 41a) and its October 22, 2004 Final Judgment (Pet. App. 61a) are unreported. The Second Circuit's March 9, 2006 Summary Order (Pet. App. 68a) is unreported.

JURISDICTION

The Summary Order of the Second Circuit affirming the district court's Final Judgment was entered on March 9, 2006, and no petition for rehearing was requested. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).[1]

---

[1] Although not a formal party to the underlying dispute, the Ministry is nonetheless entitled to invoke the Court's jurisdiction under 28 U.S.C. § 1254(1). *See Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 461 (1968) (unanimous) (exercising jurisdiction where the petitioner was adversely affected by an appellate decision but did not participate in the case before filing a petition for certiorari); *see also Devlin v. Scardelletti*, 536 U.S. 1, 8 (2002). In *Pertamina I*, the Second Circuit held that the Ministry could appeal the district court's Final Order as a non-party because the Ministry's claim that it owned "the property encompassed by the garnishment order" gave the Ministry an "'affected interest'" that entitled the Ministry to join the appeal. Pet. App. 20a (quoting *Kaplan v. Rand*, 192 F.3d 60, 67 (2d Cir. 1999)).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-11 (2000), are reproduced at Pet. App. 73a.

STATEMENT OF THE CASE

This case concerns the attachment by federal courts for over four years of nearly $310 million in revenues from the sale of liquefied natural gas ("LNG Revenues") and refined petroleum products ("Refinery Revenues") that under the Indonesian Constitution belong to the Republic of Indonesia ("Republic") for the benefit of the Indonesian people. These revenues are used by the Republic, *inter alia*, to maintain critical foreign-exchange reserves, pay sovereign debt, fund its national budget, and provide oil-based fuels to the Indonesian people at subsidized prices. Although the revenues are owned by the Republic, they pass through trust accounts in the name of the Republic's independent state-owned oil and gas company, Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina"). The Republic paid Pertamina a fee in Jakarta for its LNG services and authorizes Pertamina to use the Refinery Revenues to continue producing oil-based fuels.

Respondent Karaha Bodas Co., L.L.C. ("KBC") restrained these sovereign revenues to satisfy a judgment against Pertamina. The district court's subject matter jurisdiction over the restrained funds was predicated on the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 ("FSIA"). The Ministry appeared as a non-party with interest and argued below that the FSIA deprived the district court of subject matter jurisdiction to restrain the revenues because under Indonesian law the LNG and Refinery Revenues are the Republic's property and, as the Republic was not the judgment debtor or responsible for

satisfying the judgment, its property was immune from restraint and execution under 28 U.S.C. §§ 1609-1610. The Ministry further argued that to the extent Pertamina had any future interest in the LNG Revenues, that interest accrued in Jakarta, Indonesia and, therefore, Pertamina's interest was not "property in the United States" subject to restraint and execution under 28 U.S.C. §§ 1609-1610.

The district court and Court of Appeals ignored the Ministry's FSIA arguments. Instead, they proceeded to determine ownership of the LNG and Refinery Revenues based on New York choice of law principles that derogated from the express requirements of the FSIA that the property attached be "in the United States," and eschewed any independent examination of applicable Indonesian law governing the Refinery Revenues in favor of a presumption that U.S. law was analogous to the foreign law.

Statutory Background. The FSIA prescribes "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies or instrumentalities." *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 488 (1983); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 435 n.3 (1989). Under the FSIA, a federal court must satisfy itself at the "threshold of every action" against a foreign state whether an exception to sovereign immunity specified in the statute permits the exercise of federal jurisdiction. *Verlinden*, 461 U.S. at 493–94; *see also Amerada Hess*, 488 U.S. at 434–35.

The FSIA specifically includes immunity from compulsory attachment and execution on property. Section 1609 of the FSIA provides in relevant part that "the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter." 28 U.S.C. § 1609.

Section 1610 sets forth the limited exceptions to the broad immunity conferred in section 1609. Section 1610(a) provides seven specific exceptions to immunity from execution and attachment in aid of execution for the property of a foreign state (including its agencies and instrumentalities), but only if the property meets two threshold criteria: (i) it must be "property in the United States" that is (ii) "used for commercial activity in the United States." 28 U.S.C. § 1610(a). Section 1610(b) extends the threshold criteria under section 1610(a) to also include "any property in the United States" of an agency or instrumentality of a foreign state "engaged in commercial activity in the United States." 28 U.S.C. § 1610(b).

The Republic's LNG Revenues and Pertamina's Retention Fee. The Indonesian Constitution and laws creating Pertamina embody the principle that the sovereign has dominion over and, therefore, owns all natural resources and the revenues generated therefrom "for the greatest possible prosperity of the people." Pet. App. 9a (quoting Elucidation of Art. 33 of the 1945 Constitution of the Republic of Indonesia). To fulfill this constitutional mandate, the Republic authorizes Pertamina to enter into Production Sharing Contracts ("PSCs") with contractors licensed to extract and develop Indonesia's oil and natural gas resources in cooperation with Pertamina. Pet. App. 13a-14a.

Buyers of Indonesian LNG remit payments to trust accounts in New York. Pet. App. 14a. After the trustee services debt and deducts other specified charges and fees, the LNG Revenues are shared between the PSC contractors and Pertamina according to the terms of the PSCs. *Id.* The trustee allocates the respective shares to sub-accounts maintained in the contractors' and Pertamina's names. Pet. App. 15a. Because Pertamina takes its share under each PSC on behalf of the Republic, Pertamina has instructed the

trustee, as mandated by Indonesian law, to distribute the entirety of Pertamina's nominal share directly to Bank Indonesia's (Indonesia's central bank) foreign exchange reserve account at the New York Federal Reserve Bank. Pet. App. 15a, 38a & n.19. The LNG Revenues are used by the Republic to fund a substantial portion of the national budget, maintain Indonesia's foreign exchange reserves, and service Indonesia's foreign debt. Pet. App. 15a, 30a.

Until 2003, Pertamina received a Retention Fee from the Republic for the LNG services it provided. Pet. App. 24a-25a, 39a. Pursuant to Indonesian law, this fee amounted to "'5% (five percent) of the Net Operating Income of the relevant Production Sharing Contract.'" Pet. App. 24a (quoting Government Regulation of the Republic of Indonesia No. 41 of 1982, Art. 5(1)). Pursuant to Ministry of Finance directives, the long-standing practice was to pay the Retention Fee to Pertamina in Jakarta only after the share of LNG Revenues nominally allocated to Pertamina was credited to the Republic's treasury account at Bank Indonesia in Jakarta. Pet. App. 24a-25a & n.13.

The Republic's Refinery Revenues. Indonesian law requires that the Republic supply oil-based fuel (known by its Indonesian language acronym as "BBM") to the Indonesian people at below-market prices. *See* Pet. App. 51a-52a. The Republic has delegated to Pertamina the authority to supply BBM at prices subsidized by the Republic. Pet. App. 52a. The BBM system operates on a no-profit, no-loss basis. *Id.* Any profit goes to the Republic and any loss is subsidized by the Republic. Pet. App. 52a-53a.

To accomplish its BBM objectives, Pertamina, on behalf of the Republic, operates oil refineries that were financed and built by the Republic. In addition to producing oil-based fuels, these refineries also produce products that are not used for BBM. Pet. App. 53a. These non-BBM products are sold

both in the domestic market and as exports. *Id.* The Refinery Revenues at issue in this case are revenues from the export of such non-BBM products. *Id.* Nonetheless, the revenues from the sales of these products are used in the BBM system as a "cost reducing factor" in calculating the Republic's subsidy, such that they are treated as reducing the refinery's costs, thereby reducing the amount of the Republic's subsidy or increasing the Republic's profit. *Id.* In exchange for its BBM services, Pertamina is paid a per barrel fee and a 2% commission on non-BBM exports.

KBC's Attachment of the LNG and Refinery Revenues. In December 2000, KBC obtained an arbitral award in the amount of $261.1 million plus interest against Pertamina for breach of a geothermal development project contract unrelated to the PSC contracts. Pet. App. 11a. The arbitral panel dismissed the Republic holding it was not a proper party to the arbitration proceeding or to the contract. *Id.* In December 2001, the U.S. District Court for the Southern District of Texas confirmed that arbitral award and entered a final judgment against Pertamina in the amount of the award plus interest ("Texas Judgment"). Pet. App. 12a. KBC registered the Texas Judgment in the U.S. District Court for the Southern District of New York and that court issued an *ex parte* Writ of Execution and Order to Show Cause. *Id.* KBC immediately served Restraining Notices pursuant to N.Y. C.P.L.R. § 5222(b) on banks in New York that held the trust accounts containing the LNG and Refinery Revenues. Pet. App. 12a-13a. The bank trustees began restraining all oil and gas revenues allocated to the sub-accounts in Pertamina's name. As noted, the Republic appeared as a non-party with interest, challenging the district court's subject matter jurisdiction under the FSIA to restrain the LNG and Refinery Revenues contained in the sub-accounts in Pertamina's name. Pet. App. 16a.

The District Court's Determination of Ownership of the LNG Revenues. The district court bifurcated the case for ease of adjudication. In a Final Order dated April 24, 2002, it determined that under Indonesian law, Pertamina had a property right in the restrained LNG Revenues to the extent of the Retention Fee, while the remainder was owned by the Republic. Pet. App. 5a. Ownership of the Refinery Revenues was left for a later date. Pet. App. 5a-6a. The district court therefore concluded that KBC could execute only upon the portion of the restrained LNG Revenues equal to the Retention Fee and that the remaining revenues could not be executed upon. Pet. App. 5a.

The Second Circuit's Decision Regarding Ownership of the LNG Revenues. Although on appeal the Second Circuit held that "the Republic . . . is a 'foreign state' within the meaning of the FSIA," Pet. App. 8a (quoting 28 U.S.C. § 1603(a)), its evaluation of the Republic's FSIA claim stopped there. It failed to address *inter alia* whether, as the Republic claimed, Pertamina's future interest in the Retention Fee was not subject to restraint or execution from a portion of the LNG Revenues equal to the Retention Fee because Pertamina's interest accrued in Jakarta, Indonesia and therefore, was not "property in the United States" under 28 U.S.C. §§ 1609-1610. Instead, the Second Circuit held: "Because this is an appeal from an order executing a judgment against the property of Pertamina—as opposed to the property of the Ministry or the Republic of Indonesia—the sovereign immunity claims of the Ministry or the Republic of Indonesia are not before us." Pet. App. 22a n.12.

As discussed in more detail in Point I of the Reasons for Granting the Petition, the Court of Appeals went on to apply New York choice of law rules to determine the LNG Revenues' susceptibility to execution, and concluded that under New York substantive law Pertamina's future interest

in the Retention Fee could be restrained and executed on from a portion of the LNG Revenues equal to the Retention Fee. Pet. App. 22a-23a, 39a-40a.

The Second Circuit thus affirmed the district court's decision. It also instructed the district court to continue the stay of its judgment or substitute a similar stay until a final determination is made of the parties' rights to the disputed funds. Pet. App. 40a. In this manner, the Court of Appeals sanctioned the restraint of the Republic's LNG Revenues and subjected the Republic to more than four years of the attendant burdens of litigation from which the Republic was clearly immune under the FSIA.

The District Court's Decision on Ownership of the Refinery Revenues. In an Opinion dated October 6, 2004, the district court determined that the Refinery Revenues belonged to Pertamina because those funds were transferred directly into Pertamina's general operating funds, were used to reduce Pertamina's refinery costs, and carried as revenues on Pertamina's financial statements. Pet. App. 54a-55a. On October 22, 2004, the district court issued the Final Judgment, ordering the turnover of the entire amount of the Texas Judgment from revenues that had been kept restrained. Pet. App. 67a. The court stayed its order pending appeal and review by this Court. *Id.*

The Second Circuit's Decision Regarding Ownership of the Refinery Revenues. The Ministry appealed the Final Judgment challenging two opinions of the district court concerning the amount of Retention Fees restrained as well as the October 6 Opinion that Pertamina owned all the Refinery Revenues. On March 9, 2006, in a Summary Order, the Second Circuit affirmed the district court's opinion that Pertamina owned all of the Refinery Revenues as well as the Final Judgment. Pet. App. 70a, 72a. The Second Circuit decided the appeal only on the basis of ownership of the

Refinery Revenues, thus obviating a decision on whether the district court correctly determined the Retention Fee portion of the amounts restrained and whether Pertamina's interest in the Retention Fees was "property in the United States" that could be restrained or executed on under §§ 1609-1610 of the FSIA.

As discussed in more detail in Point II of the Reasons for Granting the Petition, the Court of Appeals held that the Refinery Revenues belonged to Pertamina based on a presumption that the Republic's rights to those funds was only as a guarantor of Pertamina's BBM operations and without any independent analysis of the applicable Indonesian law establishing the Republic's rights vis-à-vis those funds. The Court's transposing of U.S. legal principles onto a relationship between the Republic and Pertamina governed by Indonesian legal principles that do not have exact equivalents in U.S. law constitutes a fundamental disregard of applicable foreign law, disrespects principles of international comity, and is an erroneous and untenable approach to determining and interpreting foreign law.

The Second Circuit stayed turnover and execution until final review by this Court. Pet. App. 72a.

REASONS FOR GRANTING THE PETITION

I. THIS CASE SQUARELY PRESENTS AN ISSUE OVER WHICH THE COURTS OF APPEALS ARE OPENLY DIVIDED: WHETHER THE FSIA REQUIRES FEDERAL COMMON LAW OR FORUM CHOICE OF LAW RULES

A. There is a direct, open conflict in the courts of appeals over whether the FSIA requires a federal court to apply a federal common law choice of law rule or the forum state's rules. *Compare, e.g.*, Pet. App. 25a ("'[T]he FSIA implicitly requires courts to apply the choice of law provisions of the

forum state with respect to all issues governed by state substantive law.'") (quoting *Barkanic v. Gen. Admin. of Civil Aviation of the P.R.C.*, 923 F.2d 957, 959 (2d Cir. 1991)), *and Brink's Ltd. v. S. African Airways*, 93 F.3d 1022, 1030 (2d Cir. 1996) (applying forum choice of law rule to case predicated on FSIA jurisdiction), *with, e.g., Chuidian v. Philippine Nat'l Bank*, 976 F.2d 561, 564 (9th Cir. 1992) ("In this [FSIA] context, federal common law choice of law rules apply, not the choice of law rules of the forum state."), *Schoenberg v. Exportada de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir. 1991) ("[J]urisdiction in this case is based on FSIA, not diversity. Therefore, federal common law applies to the choice of law rule determination."), *and Liu v. Republic of China*, 892 F.2d 1419, 1426 (9th Cir. 1989) ("[F]ederal common law provide[s] the appropriate choice of law rule in cases arising under the FSIA."). *See generally Dumont v. Saskatchewan Gov't Ins. (SGI)*, 258 F.3d 880, 887 (8th Cir. 2001) ("In a FSIA case, 'there is no clear understanding as to whether the forum state's choice-of-law rules should apply or whether federal common law should govern . . . .'") (quoting 14A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3662 (2d ed. 1995)); *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 12 (2d Cir. 1996) ("Demonstrably, the law is unsettled when it comes to applying either a federal common law choice of law rule or state choice of law principles in non-diversity cases.") (noting conflict between Second and Ninth Circuits); *Dammareli v. Islamic Republic of Iran*, No.Civ.A. 01-2224JDB, 2005 WL 756090 at *18 (D.D.C. March 29, 2005) (same); *In re Aircrash Disaster Near Roselawn, Ind. on Oct. 31, 1994*, 926 F. Supp. 736, 739 (N.D. Ill. 1996) (same); *In re Tex. E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 870 F. Supp. 1293, 1336 n.61 (E.D. Pa. 1992) (same).

This conflict is intolerable because foreign states subject to jurisdiction in U.S. courts under the FSIA, either as defendants or as owners of property faced with attachment or execution, will face inconsistent standards on an issue as fundamental as what choice of law rule will control the substantive laws to which the foreign states or their property will be subject. This circuit split is especially provocative because of the heightened concern for nationally uniform standards under the FSIA. *E.g.*, *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) ("*Bancec*") ("When it enacted the FSIA, Congress expressly acknowledged the importance of developing a uniform body of law concerning the amenability of a foreign sovereign to suit in United States courts.") (internal quotation marks omitted); H.R. Rep. No. 94-1487, at 13, 32 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611, 6631 (noting Congress's intent to promote a "uniformity of decision" in "cases involving foreign sovereigns" and Congress's concerns about "the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area").

As detailed below, this inter-circuit conflict should be resolved by this Court in favor of a federal common law choice of law rule for federal courts exercising jurisdiction under the FSIA. A federal common law choice of law rule can lead to the creation of a federal rule of decision or the adoption of state law as the federal rule of decision when the origination of a federal rule is unnecessary. In contrast, state choice of law rules, lacking this flexibility, do not permit the creation of federal rules of decision, and can lead to results that conflict with important federal interests under the FSIA—as occurred in this case.

B. This case squarely presents the circuit split. The Court of Appeals applied New York choice of law rules to

determine the susceptibility to execution of the restrained funds and, as a result, concluded that under New York substantive law, a portion of the restrained funds was subject to execution because that portion of the funds represented Pertamina's "future interest" in the Retention Fee that the Republic pays Pertamina in Indonesia:

> In the instant action, the district court is located in New York state. We therefore apply New York law to determine what assets are "subject to enforcement, and thus available to judgment creditors." . . .
>
> "A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested . . . ."
>
> . . . .
>
> . . . "[U]nder New York law, a defendant has an interest in . . . funds if any part of the money is within the present or future control of the defendant." As property within Pertamina's control, which only Pertamina controls, the Retention is validly subject to attachment.

Pet. App. 22a-23a (quoting, first, *Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A.*, 190 F.3d 16, 20 (2d Cir. 1999), then N.Y. C.P.L.R. § 5201(b), and then New York state cases).

The Court of Appeals relied on two authorities to support its conclusion that state choice of law rules control whether any of the restrained funds are subject to execution: (i) a section of the FSIA, 28 U.S.C. § 1606; and (ii) Rule 69 of the Federal Rules of Civil Procedure. *See* Pet App. 22a. Section 1606 provides:

§ 1606. Extent of liability

> As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state *shall be liable in the same manner and to the same extent as a private individual under like circumstances* . . . .

(Emphasis added.) By its plain terms, § 1606 applies to "liability," not susceptibility to attachment or execution. Indeed, the section refers solely to immunity under §§ 1605 or 1607 (liability immunity provisions)—not to immunity under §§ 1610 or 1611 (attachment and execution immunity provisions).

In addition, Congress borrowed the operative language in § 1606 (italicized in the block quotation above) directly from an analogous provision of the Federal Tort Claims Act (FTCA), the statute that restricts the sovereign immunity of the United States: "The United States *shall be liable*, respecting the provisions of this title relating to tort claims, *in the same manner and to the same extent as a private individual under like circumstances* . . . ." 28 U.S.C. § 2674 (emphasis added). Congress clearly did not intend that such language—which should be construed *in pari materia*—govern choice of law as well as extent of liability, because Congress supplied an explicit choice of law provision in the FTCA, providing for jurisdiction over claims "under circumstances where the United States, if a private person, would be liable to the claimant *in accordance with the law of the place where the act or omission occurred*." 28 U.S.C. § 1346(b)(1) (emphasis added). There is no equivalent choice of law provision in the FSIA. *See Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1003 (9th Cir. 1987) ("The upshot is that the FSIA lacks a section corresponding to FTCA § 1346(b)."). Thus, neither § 1606 nor any other provision of the FSIA provides for choice of law.

Next, the Court of Appeals relied on Rule 69 as a basis for choosing forum law, but Rule 69 invokes only state "practice and procedure," and, in all events, makes clear that state procedures bow to federal law:

> The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, *except that any statute of the United States governs to the extent that it is applicable.*

Fed. R. Civ. P. 69(a) (emphasis added); *see also* Fed. R. Civ. P. 69 advisory committee's note to subdivision (a) ("Statutes of the United States on execution, when applicable, govern under this rule. . . . Special statutes of the United States on exemption from execution are also continued.") (1937 Adoption).

Thus, Rule 69 cannot settle the question of choice of law under the FSIA because the rule simply reverts to the FSIA, which is silent on choice of law. Accordingly, the Court of Appeals's reliance on § 1606 and Rule 69 was misplaced. As a result, the court looked to New York's choice of law rules, which in turn led to New York substantive law on the susceptibility of the restrained funds to execution.

The New York substantive rule—under which a portion of the restrained funds was subject to execution as representing Pertamina's "future interest" in the Retention Fee—was inadequate in this case because it failed to account for the *extraterritoriality* of both Pertamina's interest in the Retention Fee, and the Republic's corresponding obligation to pay it, both of which occur exclusively in Jakarta, Indonesia and arise solely under Indonesian law. The interest is

indisputably extraterritorial because both the Republic's obligation to pay, and Pertamina's interest in receipt of the Retention Fee, arise in Indonesia under Indonesian law and have been carried out exclusively and invariably in Indonesia.[2]

C. The extraterritoriality of Pertamina's interest in the Retention Fee is critical because under the FSIA, the property of a foreign state is only subject to attachment or execution if the property is "in the United States." *See* 28 U.S.C. §§ 1609-1610. If such property is outside the United States, the property is absolutely immune from attachment and execution. *E.g.*, *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1477 (9th Cir. 1992) (noting that the FSIA "does not empower United States courts to levy on assets located outside the United States"); *Fid. Partners, Inc. v. First Trust Co. of N.Y.*, 58 F. Supp. 2d 55, 61 (S.D.N.Y. 1999) ("[E]ven where an agency of a foreign state has waived immunity from jurisdiction, only assets of that foreign agency which are located in the United States may be subject to post-judgment attachment.").

---

[2] *See* Government Regulation 41/1982, Art. 4(3) (providing that Pertamina is obligated to pay the Government's portion of the PSC gas revenues to the Treasury Account and Foreign Exchange Account at Bank Indonesia); Ministry of Finance Directive MK/IV/12/1976 dated December 16, 1976 (providing Pertamina could only receive the Retention Fee from the Ministry's Foreign Exchange Account after all gas revenues from the PSCs had been received into that account); Ministry of Finance Directive S-384/MK.012/1984 dated March 28, 1984 (directing Bank Indonesia on the amount to pay Pertamina for its Retention Fee from the Ministry's Foreign Exchange Account); *see also* Pet. App. 15a; Pet. App. 38a n.19 (recognizing Pertamina's "long-standing practice . . . to hand over funds from PSCs directly to the Republic of Indonesia").

This territorial limitation on attachment and execution of a foreign state's property derives from the pre-FSIA rule that *all* property of a foreign state was absolutely immune from execution—even if the foreign state had been adjudicated liable. *E.g.*, *Morel de Letelier v. Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984) ("[P]rior to 1976 property of foreign states was absolutely immune from execution."); *see also Stephens v. Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226, 1234 (2d Cir. 1995) ("Prior to the enactment of the FSIA . . . the international rule, accepted by federal common law, [was] that the property of foreign sovereigns was absolutely immune from attachment. *The FSIA did not alter that rule, other than to create the exceptions contained in §§ 1610-1611.*") (emphasis added); H.R. Rep. No. 94-1487, at 27 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6626 ("Sections 1610(a) and (b) are intended to modify th[e rule of absolute immunity] by *partially lowering the barrier of immunity from execution*, so as to make this immunity conform more closely with the provisions on jurisdictional immunity in the bill.") (emphasis added).

Pertamina's interest in the Retention Fee indisputably lies in Indonesia. As noted, under Indonesian law, the Republic pays Pertamina the Retention Fee in Indonesia only *after* Pertamina has first transferred the *entirety* of the LNG Revenues to the Ministry's Treasury Account at Bank Indonesia. Pet. App. 35a-38a & n.19. Because the Republic's obligation to pay Pertamina the Retention Fee arises solely under Indonesian law, the territoriality of that obligation—as well as Pertamina's corresponding interest in that payment—lies in Indonesia.

The extraterritoriality of Pertamina's interest in the Retention Fee was not, however, cognizable under New York law, which simply equated Pertamina's interest in receiving the Retention Fee in Indonesia with a future ownership

interest in the restrained funds and a corresponding susceptibility to execution—despite Pertamina's unflagging obligation to transfer *all* of such funds directly to the Republic:

> While Pertamina may be under an obligation to transfer the Retention to the Ministry's account in New York, this fact does not alter the extant allocation of ownership interests. . . . "[U]nder New York law, a defendant has an interest in . . . funds if any part of the money is within the present or future control of the defendant." As property within Pertamina's control, which only Pertamina controls, the Retention is validly subject to attachment.

Pet. App. 39a-40a (quoting New York state cases) (citations omitted).

D. Despite Indonesian legal requirement and practice for payment in Indonesia, the Court of Appeals determined that Pertamina's future interest under New York law constitutes "property in the United States" and, therefore, was subject to execution under 28 U.S.C. § 1610(b)(1) because Pertamina had waived its immunity. Pet. App. 22a, 26a.

But the definition of what constitutes "property in the United States" for purposes of attachment and execution under the FSIA cannot be left to the vagaries of state choice of law rules. Particularly given Congress's concerns over uniformity in suits against foreign states, the question of what constitutes "property in the United States" under the FSIA must be determined consistently by a uniform, federal common law choice of law rule, which in circumstances analogous to those here would lead to a federal rule of decision as well. Otherwise, a foreign state subject to a judgment registered in several districts across the country, for example, could face a multiplicity of results regarding what

constitutes "property in the United States" and could receive conflicting immunity determinations for properties that are identically situated except for state boundary lines.

In *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) ("*Bancec*"), this Court described the circumstances in which the federal interest in uniformity in international relations and FSIA immunity determinations dictates that a federal court exercising jurisdiction under the FSIA apply federal common law instead of forum law, both as the choice of law rule and the substantive rule of decision.[3]

The *Bancec* Court rejected the argument that § 1606's language "the foreign state shall be liable in the same manner and to the same extent as a private individual in like circumstances" required the application "of the law of the forum . . . including its conflict principles" to the issue in dispute. *Id.* The Court explained that while the FSIA required the application of a state law rule of liability governing private individuals to foreign states in like circumstances, "[t]he statute is silent, however, concerning the rule governing the attribution of liability *among* entities of a foreign state." *Id.* The Court went on to state that in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964), it

---

[3] *Bancec* addressed whether an agency or instrumentality of a foreign sovereign could be liable for the actions of the sovereign, and held it could be liable if the presumption of juridical separateness between the entity and the sovereign were overcome by the showings traditionally required to pierce corporate veils of separateness. *Bancec*, 462 U.S. at 630-32. "Veil-piercing" is not at issue in this case because the arbitral award that underlies the judgment held exactly the opposite. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (In re Karaha Bodas Co.)*, 190 F. Supp. 2d 936, 953 (S.D. Tex. 2001) (noting that the preliminary arbitral award specifically found that the Ministry was not Pertamina's alter-ego), *aff'd* 364 F.3d 274, 284 (5th Cir. 2004) (same).

declined to apply the State of New York's act of state doctrine in a diversity action between a United States national and an instrumentality of a foreign state, concluding that matters bearing on the nation's foreign relations "should not be left to divergent and perhaps parochial state interpretations." *Bancec*, 462 U.S. at 622 n.11 (citation and internal quotation marks omitted). In thus applying federal common law both as the choice of law rule and the substantive rule of decision, the *Bancec* Court noted that "federal common law . . . in these circumstances is necessarily informed both by international law principles and by articulated congressional policies." *Id.* at 623. *Bancec*'s choice of law analysis under the FSIA, and its emphasis on the need for uniformity, apply equally here given the analogous issues of attribution of ownership interests in property "*among* entities of a foreign state" and the "amenability" of that property to execution in a U.S. court. *Id.* at 622 n.11.

Moreover, a federal common law choice of law rule also is necessary to prevent results that conflict with federal interests. A federal common law choice of law rule may lead to adoption of state law as the federal rule of decision, *e.g.*, *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001), but not if the state rule were repugnant to an overarching federal interest. Instead, federal common law would apply. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (holding that despite limits on the creation of federal common law, it is nonetheless required "where there is a 'significant conflict between some federal policy or interest and the use of state law'") (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

Permitting execution on Pertamina's "future interest" under New York law in the restrained funds—based on Pertamina's right to receive the Retention Fee in

Indonesia—undermines the absolute immunity from execution under the FSIA for a foreign state's property outside the United States. *See Fid. Partners, Inc.*, 58 F. Supp. 2d at 61. If a U.S. court could execute on an obligation owed to a foreign state outside the United States through an execution on the foreign state's "future interest" in the funds of the obligor that happen to lie within the United States, there would be a loophole in the absolute immunity of a foreign state's property outside the United States.[4] Yet, that is precisely what happened in this case. Indeed, this case is especially egregious because it concerns an obligation owed by a foreign sovereign under its laws to one of its agencies or instrumentalities within the sovereign's own borders. Significantly, the choice of law rule here must safeguard federal interests, rather than federal preemption of state law, because the FSIA neither provides the choice of law rule a court is to use in deciding susceptibility to execution nor defines "property in the United States."

Because of the potential for conflict between federal interests and state rules—a conflict presented by the Court of Appeals's decision here—a federal common law rule is required to determine what "property" is "in the United States" for purposes of execution under the FSIA. Foreign-

---

[4] Such a result could also conflict with the act of state doctrine. In this case, the Court of Appeals's execution on Pertamina's "future interest" in the restrained funds based on Pertamina's right to receive the Retention Fee in Indonesia amounted to an injunction to the Republic of Indonesia to pay Pertamina the Retention Fee in the United States rather than in Indonesia. But the Republic's decision whether to pay the Retention Fee *at all* would be an act or omission that under the act of state doctrine would not be adjudicated by a U.S. court. *Sabbatino*, 376 U.S. at 436-37 (holding that an act by a foreign sovereign within its own borders is unreviewable in a U.S. court, and that title acquired by such act is equally unreviewable even if the property enters the United States).

state immunity and foreign relations are areas where this Court has carved out niches for the creation of federal common law. *Atherton v. FDIC*, 519 U.S. 213, 225-26 (1997) (recognizing as one of the "few and restricted instances in which this Court has created a federal common law[,] . . . relationships with other countries") (citing *Sabbatino*, 376 U.S. at 425) (citation and internal quotation marks omitted); *Bancec*, 462 U.S. at 622 n.11 (rejecting New York choice of law and substantive law in favor of federal common law because of the need for uniformity under the FSIA); *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) ("[F]ederal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases."); *Sabbatino*, 376 U.S. at 425-26 ("[R]ules of international law should not be left to divergent and perhaps parochial state interpretations. . . . [T]here are enclaves of federal judge-made law which bind the States.").

If the Court of Appeals had applied a federal common law choice of law rule, it would have also applied federal common law instead of New York law as the substantive rule of decision, as did the *Bancec* court. In doing so, the Court of Appeals would not have held that any part of the restrained funds was subject to execution as Pertamina's "future interest" in the Retention Fee, because unlike the New York rule of decision, a federal common law rule of decision would have taken into account the FSIA's requirement that the property to be attached must be "in the United States," 28 U.S.C. §§ 1609, 1610, thereby giving effect to the extraterritoriality of both Pertamina's interest in the Retention Fee and the Republic's corresponding obligation to pay it, both of which arise in Indonesia solely under Indonesian law.

II. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT CONCERNING JUDICIAL PRESUMPTIONS THAT FOREIGN LAW IS SIMILAR TO THE FORUM'S LAW

A. Increasingly, federal courts must interpret or apply foreign law under Rule 44.1 of the Federal Rules of Civil Procedure, which provides that a court's determination of foreign law "shall be treated as a ruling on a question of law." Fed. R. Civ. P. 44.1.[5] Some courts determine foreign law by conducting independent research and analysis of that law while others do not. *Compare Twohy v. First Nat'l Bank of Chi.*, 758 F.2d 1185, 1193 (7th Cir. 1985) ("In determining these questions of law, both trial and appellate courts are urged to research and analyze foreign law independently"), *with Carey v. Bahama Cruise Lines*, 864 F.2d 201, 206 (1st Cir. 1988) ("By their silence, the litigants' consent to having their dispute resolved according to the law of the forum. This arrangement is not unwelcome from the court's perspective because it is spared a complicated international choice-of-law problem and can apply law with which it is familiar."); *see generally* John G. Sprankling & George K. Lanyi, *Pleading and Proof of Foreign Law in American Courts*, 19 Stan. J. Int'l L. 3, 82-84 (1983) (discussing the varying approaches to determining foreign law by federal courts). Sometimes courts simply presume that the foreign law is the same as or analogous to the forum's law. *See* Edwin P. Carpenter, *Presumptions as to Foreign Law: How They Are Affected by Federal Rule of Civil Procedure 44.1*, 10 Washburn L.J. 296,

---

[5] *See generally* Roger J. Miner, *The Reception of Foreign Law in the U.S. Federal Courts*, 43 Am. J. Comp. L. 581, 581 (1995); Doug M. Keller, *Interpreting Foreign Law Through An Erie Lens: A Critical Look at* United States v. McNab, 40 Tex. Int'l L. J. 157, 158 (2004).

298 & n.12 (1971) (citing cases); Sprankling & Lanyi, *Pleading and Proof of Foreign Law in American Courts*, *supra*, at 83 ("A number of courts politely listen to the conflicting testimony of experts and then ignore the experts' analyses of the foreign law. . . . [S]ome courts entirely bypass the conflict by avoiding discussion about the substance of foreign law and instead rely on domestic law. Apparently, the unspoken rationale for this practice is a belief that domestic law is applicable by analogy."); Andrew N. Adler, *Translating & Interpreting Foreign Statutes*, 19 Mich. J. Int'l L. 37, 61-62 (1997).

B. The Court of Appeals in this case determined ownership of the Refinery Revenues based on a presumption that the applicable Indonesian law functioned analogously to a guarantee under U.S. law and without any analysis of the underlying Indonesian law.

Following the choice of law analysis described in Point I above, the Court of Appeals referred to New York law as the source of Pertamina's presumptive ownership of the Refinery Revenues, holding that "'this presumption may be rebutted by evidence that the Republic of Indonesia actually controlled the disputed funds, or that Pertamina merely held the funds for the Republic of Indonesia, in a manner of a trustee.'" Pet. App. 71a (quoting *Pertamina I*, 313 F.3d at 86 (citing New York cases)). It then looked to "'Indonesian law uniquely applicable'" to establish the relationship between Pertamina and the Republic. *Id.* (quoting *Pertamina I*, 313 F.3d at 87). In doing so, it held that "the no-profit no-loss subsidy of the BBM regime does establish that Indonesia acts like a guarantor of Pertamina's BBM operation," but "does not deprive Pertamina of control over the refinery funds," because "Pertamina is allowed to spend those funds for any purpose, such as building asphalt plants, subject only to budgetary limitations." *Id.* The Court of Appeals concluded

by holding that because "Pertamina points to no Indonesian legal directive that deems the refinery funds Indonesia's or indicates that upon their receipt, they are anything other than 'property within Pertamina's control, which only Pertamina controls," the presumption that Pertamina owns the revenues remained unrebutted. *Id.* (citation omitted).

The Court of Appeals's speculative statement that under the BBM regime "Indonesia acts like a guarantor" has no basis at all in Indonesian law and is a presumption by the court that the rights and obligations under U.S. law of a guarantor are analogous to Indonesia's rights and obligations under Indonesian law vis-à-vis the Refinery Revenues.[6] Under Indonesian law Pertamina has rights of control and use of the Refinery Revenues, but nonetheless is not the owner of those funds. Correspondingly, Indonesia does not lose its ownership rights in the funds by virtue of allowing Pertamina to use them for purposes of maintaining BBM production and any other purpose within Pertamina's budget authority. Rather than being "like a guarantor" Indonesia still remains the owner of those funds under Indonesian law because it has unfettered dominion over them, including the right to their disposal. Had the Court of Appeals conducted an analysis of Indonesian law on its own terms, it would have ascertained concepts of divided ownership rights and property use in Indonesian law that do not have exact equivalents in U.S.

---

[6] The district court made similar presumptions based on the law of "the civilized world" in determining categorically that judgments can be enforced against Pertamina's bank accounts. Pet. App. 47a-48a ("Indonesia has a [sic] law system, the same as the rest of the civilized world. . . . If Pertamina refuses to pay, that party can enforce the judgment by levying on property of Pertamina including bank accounts. This is of course in accordance with legal systems throughout the civilized world and Indonesia is no exception").

law.

C. Under Indonesian law, both Pertamina and the Republic have ownership rights with respect to the Refinery Revenues. Pertamina's ownership right, however, is a right *to* the property because it is the holder or possessor of the Refinery Revenues and uses them on behalf of the Republic. Pertamina's ownership right is known as "Bezitter" under Indonesian law. In contrast, the Republic has an ownership right *in* the property because it owns the Refinery Revenues by virtue of its dominion over all of Indonesia's natural resources and their exploitation for the benefit of the Indonesian people. The Republic's ownership right is known as "Eigendomsrecht" under Indonesian law and is a superior ownership right to Pertamina's.[7]

These principles of dual ownership in property have their root in medieval feudal law that survived into German and Dutch law during the Reformation and later was transported to Indonesia via the Dutch colonization of that country. The feudal law developed concepts of dual ownership rights known as *dominium directum* (direct ownership) and *dominimum utile* (beneficial ownership) in conjunction with clarifying the property rights of tenant vassals and superior lords (and of superior lords and kings).[8] During the

---

[7] The principles of Bezitter and Eigendomsrecht were addressed in the proceedings below by the Republic's Indonesian legal expert, Dr. Sudargo Gautama, and were acknowledged by KBC's expert—albeit disagreeing that Pertamina had the rights of Bezitter. The district court and Court of Appeals ignored the principles.

[8] Robert Feenstra, *Dominium and ius in re aliena: The Origins of a Civil Law Distinction*, in New Perspectives in the Roman Law of Property 111, 112-13 (P. Birks ed. 1989) ("Although in principle a vassal held land only by virtue of his relationship with the lord, many vassals acted as though they were in fact owners. To the Glossators [of Justinian's Code] .

Reformation, Sixteenth Century German legal scholarship retained the concepts of a full ownership right and a beneficial ownership right in property, calling *dominium directum* and *dominimum utile*, respectively, "Eigentum" (one's own) and Besitzrechte (possessory rights).[9] Grotius's *Jurisprudence of Holland* contained similar concepts, and went further by distinguishing "Eigendom" into complete and incomplete ownership.[10] For practical purposes in order to distinguish between the two ownerships, the term owner was reserved for the one having "the greater part of the rights of ownership," such as "the person who receives the rent and who has the right of reversion . . . and not the tenant who nevertheless derives the greatest profit from the land."[11] The right to the lesser part included beneficial ownership rights, i.e., *domaine utile*.[12]

Pertamina has such lesser ownership rights (i.e.,

. . he could indeed be regarded as a kind of owner"); Harold J. Berman, *Law and Revolution, II* 168 (2003).

[9] Berman, *Law and Revolution, II, supra*, at 170 ("Ownership rights *in* a thing (*jus in re*) included . . . not only full ownership (*dominium directum*) but also beneficial ownership (*dominium utile*), including the right to possess and enjoy the fruits of the land or goods of another"); Ernst Meynial, *Notes sur la formation de la théorie du domaine divise (domaine direct et domaine utile), du XII au XIV siècle dans les romanistes*, in 2 Mélanges Fitting 413 (Meynial ed. 1908) (discussing the collaboration of Roman and Germanic law in the divided domain concept).

[10] Feenstra, *Dominium and ius in re aliena*, *supra*, at 118-19 (citing Grotius's work).

[11] *Id.* at 119-20 (quoting Grotius's work).

[12] *Id.* at 121. Grotius defined *dominium utile* as "a right of use and enjoyment," which "is a right to take the fruits of another's property without impairing the property itself." Hugo Grotius, I *Jurisprudence of Holland* 235 (Robert W. Lee tr. 1977).

possessory rights or Bezitter) in the Refinery Revenues, as it is authorized through statutes, regulations, ministerial decrees and directives to possess, use, and profit from them.[13] But its possession, use, and profit are all for the benefit of the Republic with respect to its delegated task of supplying BBM to the Indonesian people at below-market prices. The Republic maintains the upper ownership right (i.e., Eigendomsrecht) as it is the one vesting Pertamina with rights in the Refinery Revenues and the one having dominion not only over the revenues but also the natural resources from which these revenues are derived. Moreover, the Republic has the right to dispose of the property in any way it deems fit, as evidenced by the statutes, regulations, decrees and directives that authorize and delegate Pertamina's budget authority, use of and profit from the revenues.

Had the Court of Appeals conducted an independent examination of the principles underlying the concepts of Bezitter and Eigendomsrecht, rather than presuming that the Republic's relationship vis-à-vis Pertamina was the same as that of a guarantor of Pertamina's BBM operations under

---

[13] These laws, all discussed by the Ministry's expert on Indonesian law, Dr. Gautama, include: Article 3 of Joint Ministry Decree No. 2/1967 and the elucidation thereto (requiring Pertamina's predecessor to prepare an annual BBM budget and explaining that Pertamina carries on the BBM operations on behalf of the Republic); Law No. 8/1971, Article 13(b) and Government Regulation 31/2003, Art. 6(1) (delegating to Pertamina the authority to supply BBM at subsidized prices); Article 4(2) of Presidential Instruction 12 of 1975 and Article 4(2) of Government Regulation 41/1982 (defining as "State Income" the monetary value of the Republic's share of crude oil from PSCs that is used as feedstock in refineries); Pertamina Board of Commissioners' Directives N. 105/K/DKPP/1980 and No. 78/K/DKPP/2001 (Government Commissioners' directives establishing that revenues from non-BBM exports are used to reduce Republic's subsidy and establishing amount of Pertamina's fees and commissions).

U.S. law, the court would have determined that Pertamina's control over the revenues and its use of the revenues to build asphalt plants or for any other purpose within its budget authority, Pet. App. 71a, was not determinative of ownership of the revenues because such control and use are consistent with a possessory ownership right in the revenues under Indonesian law. Such an examination and determination of the applicable foreign law would have been respectful of international comity and a more consistent standard to apply in determining foreign law under Rule 44.1 of the Federal Rules of Civil Procedure.

The Court should settle the issue that in the absence of an independent examination of the applicable foreign law, it is an error of law to presume that foreign law is similar to forum law. As noted by one commentator, a result of substituting forum law for foreign law is "the embracing of a parochial view that all law is like our law (or should be)—a view out of step with the global nature of transactions and disputes." Louise E. Teitz, *From the Courthouse in Tobago to the Internet: the Increasing Need to Prove Foreign Law in U.S. Courts*, 34 J. Mar. L. & Com. 97, 98 (2003).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

CAROLYN B. LAMM
Counsel of Record
FRANK PANOPOULOS
ERIC GRANNON
ERIKA M. SERRAN
WHITE & CASE LLP
701 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 626-3600

Counsel for Petitioner

June 7, 2006